No. 83-332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

COUNTY OF LOS ANGELES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOEL H. KAPLAN
JAMES BAIRD
THOMAS J. PISKORSKI
Attorneys for the National Public Employer Labor Relations Association

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

Pandick Press Midwest, Inc., Chicago • 454-7600

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INTERESTS OF AMICUS CURIAE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION

The Amicus, hereinafter described, files this Brief because of its concern with numerous issues presented herein, including but not limited to the following:

1. The unreasonable and unduly strict BFOQ standard adopted by the courts below renders it virtually impossible to establish age as a BFOQ even for the most physically arduous and demanding jobs. It was not the standard contemplated by Congress when it established the BFOQ exemption, 29 U.S.C. § 623(f)(1).

2. A number of the law enforcement and firefighting agencies which are members of NPELRA have mandatory hiring and retirement age limits. The differing application of the BFOQ exemption by various courts to similar public safety occupations has created such a state of uncertainty that law enforcement and firefighting agencies have no established standard to which to conform their hiring practices.

3. There is no justification for denying state and local law enforcement and firefighting agencies the right to establish reasonable age limits similar to their federal counterparts.

This Brief is submitted on behalf of Amicus Curiae, the National Public Employer Labor Relations Association. Written consent of all parties to the filing of this Brief has been obtained, and letters of consent to such filing are on file with the Clerk of this Court.

The National Public Employer Labor Relations Association is a not-for-profit organization comprised of city, county, state, school district and federal managers, administrators, personnel directors and other officials who are responsible for personnel and employee relations decisions in their jurisdictions. This organization represents approximately 750 public jurisdictions in all fifty states. NPELRA members formulate, implement and administer labor relations policies and practices for these public jurisdictions and are responsible, directly or indirectly, for labor relations decisions involving more than 4.25 million public employees.

REASONS FOR GRANTING THE PETITION

I.

THE LOWER COURTS ADOPTED AN UNREASONABLE BFOQ STANDARD CONTRARY TO CONGRESSIONAL INTENT WHICH, UNLESS REVERSED, WILL SEVERELY DEGRADE THE QUALITY OF PUBLIC SAFETY SERVICES.

State and local law enforcement and firefighting agencies provide almost all of the police and fire protective services to the citizenry. The vast majority apply either mandatory hiring or retirement age limits. Because of the daily demands of local crime control and firefighting, the personnel of these agencies are involved in the most arduous and physically demanding of all public service occupations. Federal law enforcement functions are much more limited in scope as well as in the physical demands of their assignments. Yet, in the opinion of the Court of Appeals for the Ninth Circuit, Congress intended to apply different standards to state and local safety personnel than to comparable federal positions. We believe this conclusion is wrong.

The BFOQ standard adopted by the lower courts in this case improperly excludes any consideration of career longevity, personnel turbulence, and the enormous economic impact the elimination of age limits would have on the service agency and on the quality of its protective services. The holding is unduly stringent and contrary to the intent of Congress which specifically considered such factors when it authorized the setting of age limits for comparable federal occupations. The BFOQ standard articulated by the Court of Appeals, in conjunction with the medical evidence it relied upon, renders it virtually impossible for the states to sustain an age limit as a BFOQ for any occupation, no matter how strenuous and physically demanding the job may be.

The unduly strict standard adopted by the Court of Appeals further underscores the disparate treatment between federal and state law enforcement occupations, even though both admittedly are governed by the same federal statute. In the view of the Court of Appeals, age limits on similar, if not less arduous, federal law enforcement and other occupations are legal. The standard applied to state agencies such as Los Angeles County, however, renders it virtually impossible for state and local agencies to maintain any age restriction, even a reasonable one as here.

The Court of Appeals erred in rejecting consideration of the federal age limits on comparable occupations by focusing on jurisdictional factors rather than on Congress' intent for and conception of the BFOQ exemption. It is clear from the legislative history that Congress did not intend the BFOQ standard to be so strict as to be illusory. Nor did Congress intend to reject consideration of career longevity and other personnel and economic factors as they affect law enforcement agencies. Congress specifically recognized the need for law enforcement and firefighting agencies to be comprised of young and physically able individuals. In approving legislation authorizing the establishment of mandatory hiring and retirement age limits for federal law enforcement and firefighting personnel, Congress clearly stated that the intent of the legislation was to help federal law enforcement and firefighting agencies maintain a relatively young, vibrant and effective work force, both for the safety of individual officers and for the society which they serve. *See* S. Rep. No. 93-948, 93rd Cong., 2d Sess., *reprinted in* 1974 U. S. Code Cong. & Ad. News 3698. The same criteria that guided Congress' authorization of federal age limits cannot, and should not, be denied equal consideration by state and local public safety organizations.

Law enforcement/firefighting agencies are uniquely career oriented and experience intensive. Almost all such agencies require substantial field experience in the arduous assignments before assignment to less strenuous supervisory posts. At least half of a police officer's career is spent in physically demanding assignments such as patrol work—assignments which demand optimum, rather than bare minimum, physical strength and endurance. Training demands, the existence of special disability statutes, and the need to retain experienced and physically qualified officers in the arduous assignments are factors that counsel against the Court of Appeals' embracement of what is in effect a continual testing and elimination program.

Career longevity factors, cost effectiveness and the current uncertain state of medical science's ability to detect age-related

diseases justify a reasonable hiring age limit for state and municipal police and firefighters, just as they do for pilots, bus drivers, and federal police and firefighters. The issues raised in the petition of the County of Los Angeles need to be promptly addressed by this Court, not only to avoid conflicting interpretations and applications of the BFOQ exemption under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(f)(1), but also to guide municipalities in the adoption of appropriate hiring practices.

II.

A SUPREME COURT DECISION ON THE BFOQ STANDARDS APPLICABLE TO LAW ENFORCEMENT AGENCIES IS IMPERATIVE TO PREVENT CONFLICTING LOWER COURT APPLICATION.

Not only is there unjustified disparate treatment under the ADEA as between federal and state law enforcement occupations, different results continue to obtain in cases involving state and local agencies upon essentially the same facts and, presumably, the same BFOQ standard. Thus, age limitations have been upheld under the ADEA for bus drivers, airline pilots, highway patrol officers, firefighters and, most recently, college campus police officers. *EEOC* v. *University of Texas Health Science Center at San Antonio,* 710 F. 2d 1091 (5th Cir. 1983). Other courts have struck down, as being in violation of the ADEA, mandatory retirement ages for firefighters and police officers (albeit, in the latter circumstance, the individual was assigned to a non-arduous supervisory position).

Numerous courts have adopted a more relaxed BFOQ standard where public safety is involved. *EEOC* v. *University of Texas Health Science Center at San Antonio,* 710 F. 2d 1091 (5th Cir. 1983); *Murnane* v. *American Airlines, Inc.,* 667 F. 2d 98 (D.C. Cir. 1981), *cert. denied,* 456 U.S. 915 (1982); *Hodgson* v. *Greyhound Lines, Inc.,* 499 F.2d 859 (7th Cir. 1974), *cert. denied sub nom. Brennan* v. *Greyhound Lines, Inc.,*

419 U. S. 1122 (1975). Others have permitted consideration of career longevity factors such as the time available or required to become an experienced employee. *Murnane,* 667 F. 2d at 100-01. Many courts have recognized that the medical state of the art is such that it is presently impossible or impractical to detect age-related disabilities except by reference to age. *Hoefelman* v. *Conservation Commission of the Missouri Department of Conservation,* 32 Fair Empl. Prac. Cas. (BNA) 1773 (8th Cir. 1983); *Usery* v. *Tamiami Trail Tours, Inc.,* 531 F. 2d 224 (5th Cir. 1976); *Potest* v. *Palestine,* 620 S.W.2d 181 (Tex. Civ. App. 1981).

Most recently, the Court of Appeals for the Eighth Circuit upheld the removal at age 60 of a pilot employed by the Missouri State Department of Conservation on the ground that age was a BFOQ because there is no way to determine whether individual pilots are able to fly safely and efficiently except by reference to their age. *Hoefelman,* 32 Fair Empl. Prac. Cas. (BNA) at 1775-77. Although *Hoefelman* involved airline pilots, the same BFOQ exemption applicable in this case was applicable there. Unless the medical state of the art is vastly different between Missouri and other states, the same medical limitations on the detections of age-related disabilities should be recognized with regard to other state agencies.

Inconsistent and disparate treatment of age limits for law enforcement and firefighting occupations, whether in federal, state or local service, was clearly not intended by Congress. Congressional action and attendant legislative history amply demonstrate that Congress recognized age limits as appropriate under the ADEA for similar police and firefighting occupations, regardless of jurisdiction. It certainly did not intend that age limits for comparable occupations be both accepted and rejected upon the same medical evidence and BFOQ standard. Different results based on different duties or in degree of physical ability required may be justified, but not because of diverse application of the BFOQ standard. If entry age limitations are valid under the ADEA for federal officers, airline

pilots, campus police and bus drivers, as courts have held, they also should be valid for metropolitan police officers and firefighting helicopter pilots such as employed by the County of Los Angeles.

It is precisely this difference in treatment, highlighted by the inconsistent interpretations and applications of the BFOQ criteria, that is deeply disturbing to the amicus and its members. Unless guidance consistent with Congressional intent is provided by this Court, continuing diverse results will obtain with serious and far reaching impact on the nation's protective services.

This Court should grant the petition in order to consider pressing legal questions that were not in issue in *EEOC* v. *Wyoming*, 103 S.Ct. 1054 (1983), *i.e.*, to determine the appropriate BFOQ standard and criteria for law enforcement and firefighting occupations and to harmonize the application of the ADEA and its BFOQ exemption to comparable federal and state occupations.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOEL H. KAPLAN
JAMES BAIRD
THOMAS J. PISKORSKI
Attorneys for the National Public Employer Labor Relations Association

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000